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No. 1127

SUPREME COURT OF THE UNITED STATES
October Term, 1946

DIMAS YGNACIO YBARRA AMAYA, JUAN ANGEL YBARRA AMAYA, MARIA TERESA DE JESUS YBARRA AMAYA, JUANA TAMES Y SANTOS, A WIDOW, AND MARIA DEL REFUGIO AMAYA DE YBARRA, A WIDOW,

Petitioners

v.

STANOLIND OIL AND GAS COMPANY, A CORPORATION, R. A. PARR, MARGARET LILLIAN PARR HILLARD AND HER HUSBAND, VERNON HILLARD, AND SINCLAIR REFINING COMPANY, A CORPORATION,

Respondents

PETITION FOR WRIT OF CERTIORAI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF

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Treaty of Guadalupe Hidalgo

THE SUPREME COURT OF THE UNITED STATES

October Term, 1946

DIMAS YGNACIO YBARRA AMAYA, ET AL
Petitioners,

vs.

STANOLIND OIL AND GAS COMPANY, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF

To the Honorable the Supreme Court of the United States:

Your petitioners respectfully files and submits this as their petition for a writ of certiorari to review a decision and judgment of the United States Circuit Court of Appeals, handed down December 27, 1946, affirming a decision and judgment of the United States District Court for the Southern District of Texas, in favor of Respondents and against petitioners (62 Fed. Supp. 181), wherein said district court held (1) that the treaty of Guadalupe Hidalgo, entered into between Mexico and the United States, concluded February 2, 1848, had no application to Texas, and (2) that even if such treaty did apply to Texas, the stipulations contained in the last clause of Article VIII of said treaty, merely placed the class of Mexicans therein mentioned on an equal footing with citizens of Texas. (R. 215).

Motion for rehearing was filed (R. 223) and was denied on January 21, 1947. (R. 239).

Pivotol Questions Presented

A. Whether or not, the lands situated in that part of the present State of Texas, lying between the Nueces river and Rio Grande, and held under grants from Spain or Tamaulipas, Mexico, are within the protection of the stipulations of the treaty of Guadalupe Hidalgo, entered into between the United States and Mexico, concluded February 2, 1848. (9 U. S. Stat. at Large, 922, et-seq.)

B. Whether or not, the stipulations contained in the last clause of Article VIII of the said treaty of Guadalupe Hidalgo, reading: "In said territories, property of every kind, now belonging to Mexicans, not established there, shall be inviolably respected. The present owners, the heirs of these and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guaranties equally ample as if same belonged to citizens of the United States," render inoperative Texas' statutes of limitations as against petitioners.

Summary Statement of Matters Involved

This is a civil action brought by petitioners, who are Mexicans, natives, subjects and citizens of Mexico against the Respondents to recover possession of an undivided interest in a certain segregated tract of land situated in Nueces County, Texas, and forming a part of a larger grant of land situated between the Nueces river and Rio Grande, and originally granted by Spain, when it was sovereign, to its citizens who, in 1811 sold and conveyed said grant of land to one Pedro Ygnacio

Garcia, who was petitioners' remote ancestor and through whom they claim title to such interest, and for damages occasioned by the removal of minerals from said land. (R.2).

Pertinent Allegations.

Plaintiffs, in substance, alleged:

That the boundary of the Republic of Texas extended to the Nueces river (R. 9, par. 22), and it exercised no jurisdiction over the territory lying between the Nueces river and Rio Grande, (except at Corpus Christi, and Tamaulipas exercised jurisdiction over all said state, except as above (R. II, par 24), until General Taylor took actual possession thereof (R. II, par. 27). That under the Articles of Annexation, only that part of the Republic of Texas, "properly included within and rightfully belonging to said Republic," was admitted into the Union (R. II, par. 25). That at time of the treaty, all lands in said territory which had passed into private ownership was owned by Mexicans of two classes, those "established there" and those "not established there." (R. 12, par. 28). That the war with Mexico was terminated by said treaty, wherein Mexico ceded said territory to the United States (R. 12, par. 29). That under the law of nations, the municipal laws of Mexico were continued in force as to the inhabitants of said ceded territory (R. 12, par. 30). That Article IX of said treaty as originally drawn, stipulated that the inhabitants of said ceded territory,—"shall be maintained and protected in the enjoyment of their liberty, their property, and the civil rights now vested in them, according to the Mexican laws," (R. 12, par. 32; R. 13 & 14). That the United States Senate struck out said Article IX and in lieu thereof inserted the present Arti-

cle IX of said treaty, and advised the Mexican Government, by protocol and letter, that the change so made did not in any way alter the situation of the inhabitants, that "In consequence, all the privileges and guaranties—civil, political and relicious—which would have been possessed by the inhabitants of the ceded territories if the ninth article of the treaty had been retained will be enjoyed by them without any difference under the article which has been substituted." (R. 16, pars. 33, 34.)

That by the last stipulation of said Article VIII, the parties intended to and did continue in force the municipal laws of Mexico, as they existed when said treaty was concluded, as to all Mexicans owning property in said ceded territories and who were not established there (R. 17, par. 36). That under the laws of Republic of Texas, State of Texas and Republic of Mexico, an alien could not inherit from an alien or a citizen (R. 18, par. 38). That Mexico had no limitation statutes as applied to land, but applied the Spanish law of prescription, under which neither a trespasser nor a joint tenant could prescribe (R. 18, par. 39) The Court judicially knows the laws of a former sovereign (R. 17, par. 37). That the United States ceded said territory between the Nueces river and Rio Grande to Texas, September 9, 1850, subject, of course, to said stipulations (R. 18, par. 40). That neither plaintiffs nor any of their ancestors were "established" in said ceded territory since the conclusion of said treaty (R. 2, par. 2). That in virtue of said stipulation, no sort of prescription, limitations or laches operates aganst Plaintiffs (R. 22, par. 50).

Defendants Answered Generally.

1. That the land in question is not "within territory previously belonging to Mexico" or "ceded territory" as contemplated by the treaty of Guadalupe Hidalgo.

2. That, assuming the treaty does apply, then, based on the second sentence in the above quoted part of Article VIII, there should not be any discrimination in favor of Mexican Citizens as against citizens of Texas or citizens of the United States, and that this suit is without merit.

3. That the land in question is subject to the laws of Texas, particularly with reference to the statutes of limitation of three, five, ten and twenty-five years, and Texas land laws applicable to abandonment of title and presumption of grant, under which laws defendants assert they have full and perfect title. (R. 125-126).

The case was submitted to the trial Court on Plaintiffs' motion for summary judgment (R. 76), and defendants' motions for summary judgment (R. 109, 117 and 118).

The Court rendered judgment for defendants and against plaintiffs, and in its opinion (R. 123, et-seq.), held:

That the territory in the present State of Texas between the Nueces river and Rio Grande was, by reason of the Declaration of Independence of March 2, 1836; the victory at San Jacinto; the treaties with Santa Ana and the Act of December 19, 1836, part of the Republic of Texas, and its successor the State of Texas,

and formed no part of Mexico at the time of the conclusion of the treaty of Guadalupe Hidalgo, and further stated in the Opinion (R. 151) that "Although this law suit could well be ended here, inasmuch as from the foregoing it is clearly apparent that the plaintiffs have no legal right to the relief they seek, however, due to the importance of the questions here involved, it is deemed proper to discuss the other points at issue in this controversy.

"Under point 2, the defendants say that if the treaty of Guadalupe Hidalgo is applicable to the facts of this case, then such treaty should not be construed in such manner as to:

"A. Operate as a discrimination in favor of citizens of Mexico, or

"B. Subject the land in question to the laws of Mexico, but on the contrary the maximum rights which terms the plaintiffs have a right to assert and claim are that they be on equal terms with citizens of Texas. Therefore, the land in question is subject to the laws of the Republic of Texas and its successor in sovereignty, the State of Texas."

The trial Court sustained defendants' contentions in toto (R. 187).

Plaintiffs filed their motion for rehearing (R. 189) and an amendment thereto (R. 196). The trial court overruled plaintiffs motion for rehearing without written opinion. (R. 198).

Plaintiffs appealed said case to the said Circuit Court of Appeals (R. 198) and filed their points on which they intended to rely (R. 199).

The Circuit Court of Appeals affirmed the judgment below on December 27, 1946, (R. 215), and among other things, held:

1.

"Whether the lands involved were ceded or conquered, they have been a part of the United States for at least one hundred years and a part of the State of Texas at least since the enactment of the Compromise Agreement of 1850. Whether by cession or conquest, they were split away from the Mexican nation so that there was a substitution of sovereignty under which all the laws theretofore in force which were in conflict with the political character and constitutional institutions of the substituted sovereignty lost their force. **Vilas v. Manila**, 220 U. S. 345; **Chicago Railway Company v. McGlin**, 114 U. S. 542. (R. 219).

2.

"Since we are of the opinion that Article VIII of the treaty does not prevent the passage by the State of Texas of reasonable and non-discriminatory statutes regulating the title and possession of land, * * * there is no necessity for us to consider the question as to whether or not the lands between the Nueces and Rio Grande rivers were ceded by the treaty or were already under the jurisdiction, and within the domain, of the Republic of Texas, nor whether Texas acquired no jurisdiction over the land until after the passage of the Compromise Agreement between the United States and Texas, September 9, 1850. Certain it is that the lands in question are now within the boundaries of the State of Texas, and it is immaterial whether the lands were acquired by the surrender of Santa Ana or ceded by the treaty of Guadalupe Hidalgo, or whether, as was decided in McKinney v. Saviego, 18 How. 235; Basse v. City of

Brownsville, 154 U. S. 610; State v. Bustamante, 47 Tex. 320, they had been acquired by the Republic of Texas prior to the making of the treaty of Guadalupe Hidalgo. (R. 221).

3.

"We are convinced, however, as was the lower court, that there is nothing in the treaty that suggests that the property of Mexican citizens would not be subject to the valid, and nondiscriminatory, property laws of the State of Texas. The phrase "inviolably respected," even if singled out for construction, does not carry with it the significance urged by the plaintiffs. The phrase must be read in connection with the rest of the paragraph wherein the phrase is further explained by the statement that all, Mexicans, whether presently owning or subsequently acquiring, property, shall enjoy, with respect to it, guarantees equally ample as those of citizens of the United States. Even though we detach the phrase "properties of every kind, now belonging to Mexicans, not established there, shall be inviolably respected" and construe it separately, or unrelatedly to the last sentence, Plaintiffs would gain nothing thereby. Although much stress is laid by Plaintiffs upon the word "inviolably" is there a real substantial distinction between a statement that property belonging to Mexicans shall be "respected" and a statement that property belonging to Mexicans shall be "inviolably respected?" It would seem that titles that are "respected" would be as secure as those that were "inviolably respected." (R. 219).

In due course petitioners filed a motion for rehearing and challenged such decision (R. 223). Said court denied petitioners' motion for rehearing without opinion, January 21, 1947. (R. 239).

Reasons Relied Upon for the Allowance of the Writ.

1.

This case presents questions of the first importance relating to the proper interpretation of the last clause of Article VIII of the treaty of Guadalupe Hidalgo, entered into between the United States and Mexico, February 2, 1848, which has not heretofore been passed upon by this Court. An early authoritive decision of this question by this Court is of pressing importance, not only to the parties to this cause, but also to the claimants of lands under Spanish or Mexican grants situated in the territory ceded by Mexico to the United States by said treaty.

The case was brought, and has proceeded to final judgment in the court below, with due regard to procedural and jurisdictional requirements. All essential questions of jurisdiction and procedure were fully explored in the tribunal of the first instance and there decided in favor of petitioners, and that the decision sought to be reviewed is based squarely upon the merits of the important issues presented. Those issues have been determined only after full trial upon all questions of fact, as well as after full argument upon all questions of fact and law; and full findings of fact and conclusions of law have been made by the court below as required by law. (R. 123 at 187).

2.

The holding of the trial court, sanctioned by the decision of the Circuit Court of Appeals that that part of the State of Texas, lying between the Nueces river and Rio Grande, was not ceded by Mexico to the United States of America is not in accord with the following authorities, namely:

State of Texas v. Balli, 190 S. W. (2) 71, certiorari denied by this Court in 90 L. ed. 1050;

Lerma v. Stephenson, 40 Fed. 356;

Gonzales v. Ross, 120 U. S. 605;

Clark v. Hiles, (Tex. Sup.) 2 S. W. 356

Tex-Mex. Ry. Co. v. Locke, 74 Tex. 370;

State v. Saenz, 47 Tex. 307;

State v. Gallardo, 106 Tex. 274;

State v. Russell, 85 S. W. 288, writ of error denied;

Baldwin v. Goldfrank, (Sup. Ct.) 30 S. W. 1064;

Act of 27th Legislature of Texas, approved September 5, 1901, at a Special Session, page 4, Chap. 4.

3.

The decision of the Circuit Court of Appeals that when Mexico ceded said territories to the United States, the laws of Mexico, in respect to land situated therein, were immediately abrogated, and the laws of Texas applied, is contrary to and in conflict with the express stipulation in respect thereto contained in Article IX of the treaty as originally drafted, and its amendment, the present Article IX, when read in connection with the American Government's explanation to the effect that the stipulations in said original article IX were not changed, but remained the same, and that the laws of Mexico were thereby continued in force as to the inhabitants thereof.

4.

The decision of the Circuit Court of Appeals that when Mexico ceded said territory to the United States of America, its laws affecting real estate situated in said

ceded territory, were immediately abrogated and were of no force, is in conflict with the decisions of this Court in Vilas v. Manila, 220 U. S. 345; Chicago, etc. Ry. Co. v. McGlin, 114 U. S. 542; American Ins. Co. v. 356 Bales of Cotton, 1 Pet. (U. S.) 511, 542, and many other decisions of this Court.

5.

The decision of the Circuit Court of Appeals that the first sentence of the last clause of Article VIII of said treaty, reading: "In said territories, property of every kind, now belonging to Mexicans, not established there, shall be inviolably respected," does not preserve the property rights of the class of Mexicans mentioned therein, under the laws of Mexico as they existed on the date of the conclusion of said treaty, is in conflict with the weight of authority.

6.

The decision of the Circuit Court of Appeals that the word "inviolably" as used in the first sentence of the last clause of Article VIII of said treaty, reading: "In said territories, property of every kind, now belonging to Mexicans, not established there, shall be inviolably respected," adds nothing to the meaning of said sentence, or expresses the intent of its framers, to preserve such property under existing law of Mexico, is in conflict with the Rules of Interpretation of treaties as established by this Court.

7.

The decision of the Circuit Court of Appeals that, "we are convinced, however, as was the lower Court, that there is nothing in the treaty that suggests that the property of Mexican citizens would not be subject to

the valid, and non-discriminatory property laws of the State of Texas," is in conflict with the established fact that the State of Texas had no jurisdiction over said territory at time of the conclusion of said treaty, and on the contrary acquired such jurisdiction in 1850 by the Compromise Act, and accepted same subject to the stipulation aforesaid.

8.

The decision of the Circuit Court of Appeals that there is no real or substantial distinction between a statement that property belonging to Mexicans shall be "respected" and a statement that property belonging to Mexicans shall be "inviolably respected," is erroneous in that said Court ignores the meaning of the word "inviolably" as used in the last clause of said Article VIII of the treaty.

9.

The language employed by the high contracting parties in the first sentence of the last clause of Article VIII of said treaty is plain and unambiguous, and needs no interpretation.

10.

The decision of the Circuit Court of Appeals that, "We regard the phrase (the last clause of Art. VIII) as a covenant on the part of the United States to respect from thence forth any title that Mexicans then had, or might thereafter acquire, to property within the region, but not that it would guarantee that those Mexicans would never lose their title to persons by foreclosure, sales under execution, trespasses, adverse possession, and other non-governmental acts" is in conflict with applicable decisions of this Court, particularly with the

case of State of Texas v. Balli, 90 L. ed. 1050 denying certiorari to the Supreme Court of Texas; and Gonzales v. Ross, 120 U. S. 605.

11.

The decision of the Circuit Court of Appeals that the second sentence of the last clause of Article VIII of the treaty, reading "The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guaranties equally ample as if same belonged to citizens of the United States," was not intended by its framers to, (1) avoid the effect of the maxim,— Expressio unius est exclusio alterius and enable the heirs of those present owners to take said lands by descent or purchase when otherwise they could not have done so; (2) Convert what was a defeasible estate into an indefeasible estate, and (3) Permit those Mexican owners to sell and convey their lands in said ceded terirtories to Mexicans, when otherwise they could not have done so, is clearly erroneous, and in conflict with the weight of authority.

12.

The decision of the Circuit Court of Appeals that to construe the meaning of the last clause of Article VIII of the treaty to preserve the property rights of the class of Mexicans mentioned therein in accordance with the laws of Mexico as they existed on date of conclusion of said treaty, would violate the Federal Constitution is not in accord with repeated decisions of this Court.

13.

The decision of the Circuit Court of Appeals that the stipulations of the last clause of Article VIII of the

treaty is inoperative against Texas' statutes of limitation, is equivalent to a taking of petitioners' property without due process of law and violative of the Federal Constitution.

14.

The decision of the Circuit Court of Appeals that the Federal Government had not the power to stipulate in said treaty that "the property of a non-resident alien (would) be free from statutes of limitation or state regulation while that of a citizen of the state where the lands are located should be subject to such statutes," is in conflict with this Court's holdings in **Hopkirk v. Bell**, 3 Cranch. (U. S.) 454; **Missouri v. Holland**, 252 U. S. 416, 434; **Baun v. Sauerwein**, 10 Wall. 218; **Orr v. Hodgson**, 4 Wheat. (U. S.) 453; **Huaenstein v. Lyndon**, 100 U. S. 483; **United States v. 43 Gallons of Whiskey**, 93 U. S. 198; **State of Texas v. Alberto Balli**, et-al, 90 L. ed. 1050, denying certiorari to the Supreme Court of Texas; 190 S. W. (2) 71; **Gonzales v. Ross**, 120 U. S. 605.

15.

Aside from the novelty and importance of the issue presented, the decision of the Appellate Court should be reviewed for the additional reason that it is clarly erroneous and not in accord with the principles of applicable decisions of this Court, particularly with the decision in the case of Texas v. Balli, Vol. 90 L. ed. 1050, in which this Court denied Texas' petition for a writ of Certiorari to the Supreme Court of Texas, in the same case (190 S. W. (2) 71) in which said Court had held that an ordination of Texas' Constitution which required claimants of lands under Spanish or Mexican grants located between the Nueces river and Rio Gran-

de to have their lands surveyed and file such field notes and a map thereof in the State Land Office by a certain date on penalty of forfeiture of title, was void.

16.

Inasmuch as the larger portion of the lands in the territory between the Nueces river and Rio Grande passed into private ownership by grants from Spain or Mexico, and the claimants thereof, in many instances rely exclusively on Texas' short term statutes of limitation as a bar to the recovery thereof by the rightful owners, the question of whether or not the last clause of Article VIII of said treaty protects the rights of the class of Mexicans mentioned therein against such limitation claims, is of tremendous importance to such claimants, not only in said part of Texas but also in all the states composed of territory ceded by Mexico to the United States by said treaty, and this question should be settled.

* * * *

In the interest of brevity (Rule 38, par. 2), petitioners do not at this time set forth all the points which will be urged at the argument on the merits of this case should the writ be granted, nor all of the contentions in support of such points; but, in order to comply with the Rule of this Court requiring that all issues upon which decision is requested be presented in the petition for certiorari (**Gunning v. Cooley**, 281 U. S. 90, 98), petitioners here refer to and incorporates into this petition all of the matters presented in their statement of Points on appeal (R. 199) in the Circuit Court of Appeals, with the same force and effect as if herein set out in full.

Wherefore, your petitioners, refering to the attached brief in support of the foregoing reasons for re-

view, respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled on its docket: Dimas Ygnacio Ybarra Amaya, et-al vs. Stanolind Oil and Gas Company, et-al, and numbered 11,751, and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray,

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BRIEF

1.

The Opinion of the Court Below

The opinion of the Honorable Circuit Court of Appeals is reported in Vol. 158, Fed. (2)_____ and appears in the Record at Page 215 et-seq.

2.

Jurisdiction

1. The date of the judgment to be reviewed is December 27, 1946. Petitioners filed a motion for rehearing in said Court on January 8, 1947 (R. 223). The motion for rehearing was overruled without opinion, January 21, 1947. (R. 239).

II. The jurisdiction of this case is invoked under Section 2, Article III of the Federal Constitution and Section 240 of the Judicial Code as amended (28 U. S. C. 347).

Statement of the Case

3.

A sufficient statement is set forth in the petition under the heading "Statement of Matters Involved."

4.

Specification of Errors

For the sake of brevity, petitioners adopt as their specification of errors the points set forth in their petition, under the heading, "Reasons for Granting the Writ."

Summary of Argument.

Point A. The fact that Mexico ceded the territory between the Nueces river and Rio Grande to the United States is not an open question. Such cession is

indubitably established by decisions of this Court; those of the Supreme Court of Texas and by several acts of Legislature of Texas.

Point B. Under a stipulation of the treaty itself as well as under the law of nations, as recognized by this Court, the laws of Mexico, as they existed at the conclusion of said treaty, were continued in force as to the property rights of inhabitants of said ceded territories.

Point C. When you take into consideration the fact that Texas had no sovereignty over the territory between the Nueces river and Rio Grande until after said treaty was concluded, the court's error, in holding that the last clause of Article VIII of said treaty does not prevent the passage by the State of Texas of reasonable and non-discriminatory statutes regulating the title and possession of land in said territory, becomes apparent.

Point D. The effect of the last clause of Article VIII of said treaty is to preserve the property rights of the class of Mexicans mentioned therein, according to the laws of Mexico as they existed on the date of the conclusion of said treaty.

Point E. The United States had the power to make the stipulations contained in the last clause of Article VIII of said treaty.

ARGUMENT

Point A

The fact that by the treaty of Guadalupe Hidalgo, Mexico ceded to the United States of America, among other territories, that part of the present State of Texas, lying between the Nueces river and Rio Grande is not an open question, but is an indubitable fact, as shown by decisions of this Court; the Supreme Court

of Texas, and the several legislative acts of the Texas' Legislature, thus:

State of Texas v. Alberto Balli, et-al., 190 S.W. (2) 71. Ceriorari denied by this Court (May 27, 1946) Vol. 90 L. Ed. 1050;

Gonzalez v. Ross, 120 U. S. 605;

Lerma v. Stephenson, (Cir. Ct. W. Dist. Texas) 40 Fed. 356;

Clark v. Hiles, (Tex. Sup.) 2 S. W. 356;

State v. Saenz, 47 Tex. 307;

State v. Gallardo, 106 Tex. 274;

State v. Russell, 85 S. W. 288, writ of error denied.

In the very recent case of the **State of Texas v. Alberto Balli**, supra this Court denied the State's petition for a writ of certiorari to the Supreme Court of Texas, in the same case wherein the Supreme Court of the State of Texas had held that the territory between the Nueces river and Rio Grande was within the protection of said treaty. The question was squarely raised by the State in the Texas Courts, and likewise in its petition for writ of certiorari to this Court, wherein, at page 14 of said petition, its III Question Presented, reads as follows:

> "The Supreme Court of Texas has misconstrued and misapplied the Treaty of Guadalupe Hidalgo by holding that it applies to Padre Island. This Court in **Elisha Basse v. City of Brownsville**, Texas, 154 U. S. 610, 22 L. ed. 420, dismissed an application for writ of error to the Supreme Court of Texas on the ground that:

" 'In McKinney v. Saviego, 18 How. 240 (59 U. S. A. V. 367), it was decided that the treaty of Guadalupe Hidalgo has no relation to property included within the State of Texas'."

And in its argument in support of its petition states at pages 59 on its petition and brief that—"The United States District Court for the Southern District of Texas in **Amaya, et-al, v. Stanolind Oil and Gas Company**, 62 Fed. Supp. 184, has recently followed the holding of this Court in **Elisha Basse v. City of Borwnsville** and McKinney v. Saviego, 59 U. S. (18 How.) 367," which is the case now at bar.

This Court, on May 27, 1946, denied the State's said petition for writ of certiorari, and overruled its motion for rehearing. (Vol. 90 L. ed. p. 1050).

In **Clark v. Hiles**, 2 S. W. 356 (A. D. 1883) the land in controversy was a Spanish grant on the East bank of the Rio Grande, and Chief Justice Willie, speaking for the Supreme Court of Texas, stated:

"That the land was within the territory declared by the State (Republic) on December 19, 1836, to be subject to her jurisdiction, **was not considered a matter of sufficient importance to deserve attention.** It is true that, on the date last mentioned, Texas, in defining her boundaries, claimed civil and political jurisdiction to the Rio Grande, but the jurisdiction was never acknowledged by Mexico till the treaty of Guadalupe Hidalgo, in 1848."

Chief Justice Roberts of the Supreme Court of Texas in the case of State v. Saenz, 47 Tex. 307, speaking on the question of the treaty and the acquisition by Texas of jurisdiction over that part of the former State

of Tamaulipas extending across the Rio Grande, said:

> "That it, the treaty, thereby settled the boundary of Texas as in reference to this part of the country, as between Texas, in the United States, and Tamaulipas, in Mexico," and, further, that "as between Texas and the United States, the right of Texas to the jurisdiction of Texas over the territory east of the Rio Grande, was definitely settled by the Act of Congress (called one of the compromise acts) on the 9th of September, 1850, and acceded to by the State of Texas on the 25th of November, 1850."

Texas had no jurisdiction over the territory below the Nueces was declared by the Legislature of the State of Texas in January, 1858, when, in a report of claims of certain citizens of Laredo, the report was adopted by the House of Representatives (See Journal of the House Vol. 7, pp. 702 and 797), and afterwards adopted by the Senate (See Senate Journal of 1858, pp. 328, 329, 330) and the bill was approved by the Governor). The senate report says: "There can be no pretense that, under the treaty of Santa Ana, and the passage of the act of December, 1836, the territory of Texas extended beyond the Nueces and Medina." The House report reads: "The committee believes that under no equitable or legal view of the law can they, (certain citizens of Laredo) be entitled to headrights as citizens of Texas, because Laredo was, at the time of the declaration of Independence, a part of the State of Tamaulipas, and continued under Mexican jurisdiction until 1845—its citizens adhering to the enemy." (House Journal, 1858, p. 702).

Act of 27th Legislature of Texas, approved September 5, 1901 at a Special Session, Page 4, Chap. 4, providing for testing of validity of titles in said territory, in part declares:

> " . . . that any person or persons who may be the original grantee, heir, legal assign, or in any manner the owner or claimant of any grant, tract or survey of land or part, situated between the Nueces and Rio Grande and below a line drawn from the northern boundary of Webb County to the mouth of Moros Creek, where the same empties into the Nueces river, and emanating or claimed to have emanated from the Spanish or Mexican governments, and having its origin at such time as to be and being within the protection guaranteed by the treaty of Guadalupe Hidalgo, entered into between the United States and Mexico, and proclaimed on the 4th day of July, 1848, may file a petition . . . "

Acknowledged Limits of the State of Texas Was at Nueces River

President Polk, May 11, 1846, in a message to Congress, after stating that General Taylor had encamped his forces on the east bank of the Rio Grande, opposite the City of Matamoros, Tamaulipas, further stated that,—

> "The Mexican forces at Matamoros assumed a beligerent attitude, and on the 12th of April General Ampudia, then in command, notified General Taylor to 'break up his camp within twenty-four hours and to retire beyond the Nueces river,

and in the event of his failure to comply with these demands announced that arms and arms alone, must decide the question,***"
(Richardson, Messages of Presidents, Val. IV at 441).

POINT B

Said Court's decision that when Mexico ceded said territories to the United States, the laws of Mexico as applied to lands in said territories, were immediately abrogated, is in conflict with the treaty itself, and also the decisions of this Court.

1. Article IX of the original treaty provides that in said ceded territories, until states are made of such territories, the inhabitants of such ceded territories, "shall be maintained and protected in the enjoyment of their liberty, their property, and their civil rights now vested in them according to the Mexican laws. (R. 13-14).

Such original draft of said article was unacceptable to the Senate and it substituted, in lieu thereof, the present article IX of said treaty. (R 16).

After the Senate had made such substitution and before same was submitted to the Congress of Mexico for its ratification, James Buchanan, Secretary of State, addressed a note to the Minister of Foreign Relations of the Mexican Republic, dated March 18, 1848, in which he referred particularly to such amendment and said:

> "This article (IX) is substantially the same with the original 9th. article, but it avoids unnecessary prolixity and accords with the former

safe precedents of this Government in the Treaties by which we acquired Louisiana from the French and Florida from Spain." (Treaties and other International Acts, by Miller, Vol. V, p. 254.

On February 8, 1848, Mr. Polk advised Congress that: "The ninth article of the treaty, as adopted by the Senate, is much more comprehensive in its terms and explicit in its meaning, and it clearly embraces in comparatively few words all the guaranties inserted in the original article."

"The protocol asserts that 'The American Government, by suppressing the ninth article of the treaty of Guadalupe Hidalgo and substituting the third article of the treaty of Louisiana, did not intend to diminish in any way what was agreed upon in the aforesaid article (ninth) in favor of the inhabitants of the territories ceded by Mexico. Its understanding is that all of that agreement is contained in the third article of the treaty of Louisiana . . . " (Richardson, Messages of Presidents, Vol. IV, p. 683).

Mr. Polk also advised the Senate that—"The deliberations of the Mexican Congress, with no explanation before that body from the United States, except the letter of the Secretary of State, resulted in the ratification of the treaty, as recommended by the President of that Republic, in the form in which it had been amended and ratified by the United States. (Richardson, Vol. IV, p. 682, bottom of page).

2. Said doctrine so announced by said Circuit Court of Appeals has no basis in law, and this Court has repeatedly held the contrary. In Chicago, etc., v. McGlin, supra, this Court stated the rule to be:

> "Thus upon a cession of political jurisdiction and legislative power—and the latter is included in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect, and the laws of the country on other subjects would necessarily be superceded by existing laws of the new government upon the same matters. But with respect to other laws affecting the possession, use and transfer of property, and designed to secure good order and peace in the community, and promote the health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until by direct action of the new government they are altered or repealed. (114 U. S. 546).

POINT C

Said Court's decision that the language employed in the last clause of Article VIII of said treaty, does not prevent the passage by the State of Texas of reasonable and non-discriminatory statutes regulating the title and possession of land in said territories, is we submit, clearly untenable.

The fallacy of such decision is apparent when you take into consideration the fact that the State of Texas

had no sovereignty over said territory until the consummation of the Compromise Act of September 9, 1850 between the United States and the State of Texas.

This situation was admirably expressed by Chief Justice Roberts of the Supreme Court of Texas, in the case of State v. Saenz, 47 Tex. 307, wherein he, first speaking of the effect of said treaty remarked that it, "thereby settled the boundary of Texas in reference to this part of the country, as between Texas, in the United States, and Tamaulipas, in Mexico," and secondly he stated that, "As between Texas and the United States, the right of Texas to the jurisdiction of Texas over the territory east of the Rio Grande, was definitely settled by the act of Congress, (called one of the Compromise Acts), on the 9th of September, 1850, and acceded to by the State of Texas on the 25th of November, 1850."

And, of course, Texas accepted such territory, subject to the stipulations of said treaty.

POINT D

Said Court's decision that the last clause of Article VIII of said treaty does not impose the duty upon the United States to protect the property rights of the class of Mexicans mentioned therein, as they existed under the laws of Mexico when said treaty was concluded, is, we submit, repugnant to the import of the language used and untenable.

Petitioners' Contentions Summarized

Petitioners' contend that the phrase, "shall be inviolably respected", as used in the first sentence of the last clause of Article VIII of said treaty, means that the property of the class of Mexicans mentioned therein, shall be, as long as that class owns said property, pre-

served according to the laws of Mexico as they existed when said treaty was concluded, and that the second sentence of said last clause was employed to (1) avoid the effects of the maxim, "Expressio unius est exclusio alterius," and permit the descendants of said present owners to take by descent when otherwise they could not have done so; (2) Convert a defeasible estate into an indefeasible estate, and (3) Permit a Mexican alien to purchase said lands, and that Texas acquired sovereignty over said territory on September 9, 1850 by the Compromise Act, subject of course to said stipulations.

Trist's Explanation

Mr. Trist, the American Commissioner throws some light on the situation. In respect to this he reported to his government that:

"The conditions of the inhabitants of the ceded or transferred territory is the topic upon which most time has been expended, in the mode stated at the commencement of these remarks. It constituted a subject upon which it was all-important that the Treaty should be guarded at all points, and should recommend itself as strongly as possible. Every thing proposed on the other side in regard to it was inadmissible or objectionable, in substance or form; and the articles, as they now stand (Article 8 and 9; the latter was recast in the Senate), are the result of draughts prepared by myself, and were repeatedly amplified and otherwise altered, to meet the wishes of the Mexican Commissioners.

"The stipulation regarding the incorporation of the inhabitants into our Union were restricted to Mexican inhabitants, because, as the Mexican Commissioners stated, their Government has no right to enter into such

stipulations in regard to the foreigners who may be residing in the transferred territory. The right of Mexicans residing there, to continue there, retaining the character of Mexican citizens would follow, as a necessary consequence, from the right secured to such Citizens by the Treaty of Commerce, to go and reside there. On this point, and for the right secured to such citizens, resident or non-resident, to retain the landed property, they may now own there, a precedent was afforded by our British Treaty of 1794 (Articles 2 and 9 of Document 16). The liberty to 'grant, sell or devise the same to whom they please,' I qualified by restricting the right of purchase to Mexicans. This stipulation is particularly important to landholders on the Rio Bravo, and especially so, to the Citizens of Tamaulipas, the estates of some of whom, situated south of the Bravo, are dependent in some respect for their value, upon lands on the north of that river, which are used as pastures. (Miller, Treaties, Vol. V, p. 306).

Court's Opinion Summarized

The Circuit Court of Appeals refutes this contention and held:

"We are convinced, however, as was the lower Court, that there is nothing in the treaty that suggests that the property of Mexican citizens would not be subject to the valid, and non-discriminatory, property laws of the State of Texas.

"The phrase 'inviolably respected', even if singled out for construction, does not carry with it the significance urged by the Plaintiffs. The phrase must be read in connection with the rest of the paragraph wherein the phrase is further explained by the statement that all Mexicans, whether presently owning, or subsequently

acquiring, property, shall enjoy, with respect to it, guaranties equally ample as those of citizens of the United States.

"Even though we detach the phrase 'Properties of every kind, now belonging to Mexicans, not established there, shall be inviolably respected' and construe it separately, or unrelatedly to the last sentence, Plaintiffs would gain nothing thereby. Although much stress is laid by Plaintiffs upon the word 'inviolably' is there a real or substantial, distinction between a statement that property belonging to Mexicans shall be 'respected' and a statement that property belonging to Mexicans shall be 'inviolably respected'? It would seem that titles that are 'respected' would be as secure as those that were 'inviolably respected'.

"We regard the phrase as a covenant on the part of the United States to respect from thence forth any title that Mexicans then had, or might thereafter acquire, to property within the region, but not that it would guarantee that those Mexicans would never lose their title to persons by foreclosure, sales under execution, trespasses, adverse possession, and other non-governmental acts." (R. 219-220).

Bear in mind that the last clause of said Article VIII contains two separate and distinct sentences, each having a different object, purpose and meaning.

The first sentence thereof, reading: "In said territories, property of every kind, now belonging to Mexicans, not established there, shall be inviolably respected, are, we submit, words of ENACTMENT. There is no room for interpretation. The language is express and intelligible. It is emphatic. It is, in terms, an enact-

ment. It is simple and easily understood. It creates but one Casus foederis; that is, the preservation of the property rights of the class of Mexicans mentioned according to the laws of Mexico, as they existed when said treaty was concluded. The Court cannot vary it or super add another.

The Word "Inviolably" Defined

The word "inviolably" as used in said sentence is the adverb of "inviolable", which word, says Webster, "is derived from the Latin word 'inviolatius', which is defined by Ainsworth to mean, 'not corrupted, immaculate, unhurt, untouched'," or, as defined by the Dictionary of the Spanish Academy, the Spanish word 'inviolablemente' as used in the same article of said treaty in the Spanish language, and which corresponds to the English word 'inviolably', means something or a status, "That must not, or cannot be violated."

This Court has held that the words, "shall be", are controlling words. In **Brien v. Williamson,** 7 How. 21, it was stated that the words "shall be, when used by a law-making power, are words of enactment. They declare the law, and are not to be construed as 'may be'."

Can it be consistently contended that the phrase "shall be inviolably respected" as employed in said treaty and the phrase used in the several State Constitutions that "the right to trial by jury shall remain inviolate" are not synonymous? We submit that they are.

"Remain inviolate", as used in the Constitution of Tennessee, Art. 1, Sec. 6, providing that the right of trial by jury shall remain inviolate means that it shall be preserved as it existed at common law at the time of the adoption of the Constitution. **Gribble v. Wilson,**

49 S. W. 736). (See Isam v. Mississippi Cent. Ry. Co., 36 Miss. 308).

Mr. Cooley, in his work on Constitutional Limitations, remarks that, "The several Constitutions of the States contain ordinations that the right of a trial by jury shall remain, 'inviolate', and it has been uniformly held to construe this to perpetuate the right in the cases in which it exists, under the laws in force at the date of the adoption of the particular constitution." Cooley, Const. Lim. 506.

Said phrase in said constitutions is a guaranty to the people of the state, that their right to a trial by a jury shall be "preserved" as it existed under the law in force at the time of its ordination.

By parity of reasoning, said phrase in the treaty, is a guaranty to the class of Mexicans mentioned therein, that their property rights in said ceded territory, shall be, "preserved", in accordance with the laws of Mexico in force at the time said treaty was concluded.

Petitioners' contention is aptly voiced by Chief Justice Roberts in the case of State of Texas v. Saenz, 47 Tex. 307, 311, by remarking that:

> "By the treaty of Guadalupe Hidalgo, it was stipulated that the civil rights of Mexicans, within the territory ceded to the United States, as they existed under the laws of Mexico, should be protected by the United States."

Judge Nelson Phillips expressed the same opinion in delivering the opinion of the Supreme Court of Texas in the case of Kenedy Pasture Company v. State, III Tex. 200, by stating that:

"It (the treaty) stipulated that the civil rights of Mexicans within territory ceded by Mexico, as they existed under the laws of Mexico when the treaty was signed should be protected."

Another Factor To Be Considered

It is well settled in this Court that "The terms of a treaty are to be applied to the state of things then existing in the ceded territory" (**Strother v. Lucas,** 12 Pet. 488).

"Treaties," said Chief Justice Marshall in the **Nereide** case, "are formed upon deliberate reflection. Diplomatic men read the public treaties made by other nations and cannot be supposed either to omit or insert an article, common in public treaties, without being aware of the effect of such omission or insertion. Neither the one nor the other is to be inscribed to inattention." (9 Cranch. 419).

Irrefutable Presumptions

The commissioners who framed and concluded said treaty were selected by each government because of their knowledge and experience in such matters.

It will be presumed that they knew the laws of both countries, and that in the territory between the Nueces river and Rio Grande, lands which had passed into private ownership was owned by Mexicans of two classes, viz: those "established" there and those "not established" there, they also knew of the import of the law of nations and the decisions of the Supreme Court of the United States in respect to "conquered or ceded" territory, and that in the case before them, the municipal laws of Mexico, as to the inhabitants of said ceded

territories would remain in full force and effect until changed by the United States of America, and on the other hand they knew that those non-resident Mexicans owning lands in said ceded terirtories had no protection whatever, and that their property would be subject to escheat and become valueless unless some protection thereof was stipulated for in said treaty. They also knew that under Mexican law existing at the time, neither a trespasser nor a joint tenant could acquire a title to land by prescription.

They also knew that on account of the war between Spain and Mexico (1810-1821), the war between Texas and Mexico (1836) and the war between the United States and Mexico (1846-1848) the owners of these lands had become scattered over various parts of Mexico, and many had lost all trace of their title, and that such situation would spur the activities of unscrupulous men of both nationalities, to advantage themselves by reason of the invincible ignorance of such owners, occasioned by such circumstances.

They also knew that the United States of America had no limitation laws as respects real property, and|or laws of distribution and descent in regard to real estate, and|or laws regulating the conveyance of land; and they also knew that under the laws of the Republic of Texas, an alien could only hold land by titles emanating from the Republic itself; they likewise knew that under the laws of the Republic of Texas, the State of Texas and the Republic of Mexico, an alien could not inherit land from an alien, or convey lands situated in a foreign country; they knew that many of the original owners of lands situated within said ceded territories, and who were not established there, had died, intestate or other-

wise, and left heirs, who were scattered over various parts of Mexico, and they were unfamiliar with the language, laws and customs of any foreign country, and that unless some stipulation for the protection of the property rights of those non-resident owners, and the heirs of these, their property would be forfeited or rendered worthless.

So, in their wisdom, they framed the stipulation in said treaty, that in said ceded territories "property of every kind, now belonging to Mexicans, not established there, shall be inviolably respected," and by said treaty placed that burden on the United States of America.

Then, in order to protect the rights of the heirs of these non-resident Mexican owners, as well as Mexican purchasers of said lands, they framed the stipulation in said treaty that "The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guarantees equally ample as if the same belonged to citizens of the United States," knowing that thereby they were avoiding the effects of the maxim,—**expressio unius est exclusivio alterius,**—and enabling an heir of such owners to take by devise or inheritance, when otherwise he could not have done so, and also sanction the sale and conveyance of such lands to a Mexican alien, when otherwise it could not be done, and placed such provision in article VIII of the draft of the treaty to be submitted to the two governments.

Many of the motives which must have operated on Mexico are equally obvious. She reluctantly ceded the Nueces strip to the United States. She knew that the inhabitants of said strip were protected by the law of Nations. She knew that her citizens and subjects who

owned land in said strip and were not inhabitants thereof had no protection under the law of nations, or otherwise. She naturally wished to protect her said citizens and subjects in their ownership in said territory. She did not intend to sacrifice them. Their fidelity to her every vicisitude, stimulated her to exert every effort to that end. In the last clause of the eighth article, the parties were stipulating for the protection, security and advantage of this class of citizens and subjects of Mexico, who owned property in said territory and were "not established there."

Would Mexico have signed said treaty if it had known that its citizens and subjects owning property in said territory between the Nueces river and Rio Grande and who were not established there would be subject to the alien laws and|or the statutes of limitation of the State of Texas? **Most certainly not.** Under the alien laws of Texas their titles would be defeasible. Under Texas short statutes of limitations a trespasser could acquire their titles, while under Mexican law neither a trespasser nor a joint tenant could prescribe.

As further evidence of the intent of Mexico they caused to be inserted in said treaty, Article XXI to the effect that in the event of a misunderstanding as to the meaning of any stipulation contained in the treaty, such should not cause a reprisal, but same should be settled by arbitration.

Now, then, to the question, what did those high contracting parties mean by said two stipulations?

Did they mean by such stipulations that the owners of land in said ceded territory and, "not established" there, should be governed by laws contrary to the laws

of Mexico existing at the time of the conclusion of said treaty?

Did they mean that the right of the heirs at law of these Mexicans owning lands in said ceded territory and "not established" there, should be governed by laws contrary to the laws of Mexico as they existed at the time of the conclusion of said treaty?

Did they mean that the right of an owner of land within said ceded territory and, "not established" there, to convey his land to a Mexican, should be governed by laws contrary to the laws of Mexico as they existed at the time of the conclusion of said treaty?

The draft of said Article VIII was submitted to the two governments, and was acceptable to each, and it is the supreme law of the land.

If the United States were not content to receive the territory, charged with that duty and obligation, they ought to have made, yea, would have made such exceptions as they deemed necessary.

The situation of these Alien Land Owners is aptly illustrated by this Court in the case of **McKinney v. Saviego**, 18 How. 235 as follows:

"The constitution of Texas, by way of exception to the general inhibition upon aliens to 'hold lands except by titles emanating directly from the republic', declares that if any citizen should die intestate or otherwise, his children or heirs shall inherit his estate, and aliens shall have a reasonable time to take possession of and dispose of the same in the manner to be hereafter pointed out by law.'

"The 10th section of the law of distribution and

descent, (Hart. Dig. Art. 585), provides: 'In making title to land by descent, it shall be no bar to party that any ancestor through whom he derives his descent from the ancestor, is or hath been an alien; and every alien to whom any land may be devised or may descend, shall have nine years to become a citizen of the republic and take possession of such land; or shall have nine years to sell the same, before it shall be declared forfeited, or before it shall escheat to the government.'

"The first clause of this section is substantially a re-enactment of the statute of 11 and 12 William III, c. o., and removes no other defect than the want of inheritable blood arising from the alienage of some person through whom the heir must deduce his claim." McGreery v. Somerville, 9 Wheat. 354.

"The second clause modifies the existing laws which regulates the capacities of aliens to take or hold real property in the State, whether by devise or descent.

"But the remedial effect of the act does not extend beyond the disability of an alien heir. It contains no enactment in favor of an alien who may have acquired possession of property in lands, whereby he could make a valid bequest or transmit it to his heirs, whether aliens or citizens by descent.

"The act of which this section forms a part is framed for the disposal of the estates of those having 'title to any estate in inheritance, and regulates its descent or distribution.'

"The prohibition in the constitution upon aliens to hold lands in Texas, and the limited powers of congress to introduce favorable conditions in favor of alien heirs, must be remembered in ascertaining its

meaning. The constitution had provided for the transmission of estates of citizens to their children or heirs, (being citizens), and then provides that congress shall legislate to give to aliens a reasonable time to take possession and to dispose of such an inheritance. Neither the language of the act nor the policy of the State, as it may be discovered from its constitutions and laws, authorizes the conclusion that an alien, claiming real property in Texas, can transmit it by descent, to an heir, who is also an alien.

"The subject matter to which these provisions all relate is the estates of citizens; and we cannot apply their conditions to the special and peculiar case of an inheritance claimed by an alien heir in the right of an alien intestate. The question has not arisen, so far as we can discover, in the courts of Texas; but in the case of Cryer v. Andrews, II Tex., 170, the court seems to assume that the act we have considered was a legislative compliance with the constitutional guarantees in favor of their alien heirs of deceased citizens; and that the alien heir must, within nine years, sell the land or become a citizen. In the present instance, citizenship has not been acquired, which that court seems to treat as a prerequisite to an entry on the inheritance."

This Court will judicially know that at the time of the conclusion of said treaty, the United States had no limitation statute in respect to actions to recover real estate; no law regulating the descent and distribution of land; no law regulating the conveyance of real estate.

Spanish Law of Prescription

This Court will judicially know that the municipal laws of the Republic of Mexico, as they existed on the

date of the conclusion of said treaty, are not foreign laws to be determined as a question of fact, but are laws of the former sovereign and the courts are bound to take judicial notice of them. (See U. S. v. Perot, 98 U. S. 426; U. S. v. Turner, II How. 663; Fremont v. U. S., 17 How. 452; U. S. v. Chavez, 159 U. S. 452; Crespin v. U. S., 163 U. S. 163).

The Court will also judicially know that Mexico on the 2nd of February, 1848, had no limitation statute, but had adopted the Spanish Law of Prescription in respect to real estate, and that under it neither a trespasser or a joint tenant could prescribe, which law continued in force until 1889.

See Schmidt's Translation of the Civil Law of Spain and Mexico, and particularly article 1360 thereof, which declares:

> "A co-proprietor cannot acquire by prescription the thing he owns in common with another."

The proof in the case at bar clearly establishes the fact that plaintiffs and defendants are joint tenants or tenants in common of the land involved.

Mr. Joseph M. White, the author of White's Recopilation of the laws of Texas and Mexico, a standard authority, treats extensively of the Spanish law of Prescription, and sums up the same in these words, viz:

> "A prescription to be good must be in good faith under a legal title.
>
> "The good faith that ought to accompany a possession to complete a prescription may be defined, the just opinion which the possessor

has, that he has acquired a property in the thing.

"If I buy real estate from one who has only authority to collect rents and thinks he has a right, this is not a just opinion and therefore no foundation for prescription."

The title under which a prescription is claimed must not only be one which, in its nature is capable of transferring the property, but that it must be:

"1st. A valid title.
"2ndly. It must not be suspended.
"3rdly. It must be continued.—Pothier, p. 608.

"A title being invalid, nothing can be acquired by prescription." (See White's Recop. Vol. 1, pp. 91).

In short, we submit, that the meaning of the first sentence of said last clause of article VIII of said treaty, is that the then owners of property in said ceded territory and not established there, should be protected in their property rights according to the then existing laws of Mexico, and the second sentence of said last clause means that the heirs of these owners could take said property by descent or purchase, when otherwise they could not do so, and also to sanction the sale of said property to Mexicans, when otherwise they could not do so.

In fact, it is our opinion that any other construction of said stipulation would at least, defeat the intent of the high contracting parties who framed and adopted such stipulations, if not, it is an absurdity in itself.

Irresistible Inference

When you take into consideration the fact that;

as heretofore shown, upon the cession of said territory by Mexico to the United States, the municipal laws of Mexico, as they then existed, were continued in force as to those Mexicans who owned lands in said ceded territories and who were "established" there, the inference is irresistible that the only way the high contracting parties to said treaty could protect the interest of those Mexicans who owned lands in said ceded territories and who were "not established" there, was to continue in force the said municipal laws of Mexico as to them. Otherwise, how could those interests have been protected? It is certain that such interests could have no protection under existing laws of the United States. Even the laws of Texas not only were inimical to their rights, but designed to destroy them.

POINT E

A treaty may over-ride the power of a state. Would petitioners' construction of Article VIII of the treaty be, as asserted by the Circuit Court of Appeals, violative of the Federal Constitution?

In reference to this, said court propounds this question: "Would the requirement that the porperty of a non-resident alien be free from the statutes of limitation or state regulation while that of a citizen of the state where the lands are located should be subject to such statutes, be inconsistent with the general concept of the equal protection of the law and likewise repugnant to the general purpose of the last sentence of Article VIII of the treaty?

This Court has answered that question:

In Missouri v. Holland, 252, U. S. 416, 434, 64 L. ed 641, 648, II A.L.R. 984, 40 Sup. Ct., 382, Mr. Justice Holmes, said:

"Valid treaties of course 'are as binding within the territorial limits of the states as they are elsewhere throughout the dominion of the United States' Baldwin v. Franks, 120 U. S. 678, 683. No doubt the great body of private relations usually fall within the control of the states, **but a treaty may override its power.** We do not have to invoke the later developments of constitutional law for this proposition. **It was recognized as early as Hopkirk v. Bell, 3 Cranch. 454, with regard to statutes of limitation,** and even earlier as to confiscation, in Ware v. Hylton, 3 Dall. 199. It was assumed by Chief Justice Marshall with regard to escheat of land to the state in Chirac v. Chirac, 2 Wheat. 259, 275. Hauenstein v. Lyndon, 100 U. S. 483, Geofry v. Riggs, 133 U. S. 258; Blythe v. Hinckley, 180 U. S. 333, 340."

Now, having demonstrated, we believe, that said stipulation is not violative of the Federal Constitution, and the burden was placed on the United States to protect the property rights of the class of Mexicans mentioned therein, according to the laws of Mexico as they existed on the date of the conclusion of said treaty, we come to the question,

What Is The Court's Duty In Case of Conflict Between Treaty and State Law?

The constitution provides that all treaties made or which shall be made, under the authority of the United States, shall be the supreme law of the land, and as such they are paramount to the constitution, or the laws of a particular state. (U. S. Const. Art. 6, Par. 3); and Article 3 providing that the judicial power of

the United States shall extend to all cases in law and equity arising under the treaties made, or which shall be made, under their authority, places the interpretation and enforcement of treaties within the scope of the judicial powers of the United States.

It is the necessary result of the explicit declarations of the Federal Constitution above referred to that where there is a conflict between a treaty and the provisions of a state constitution or of a state statute, whether enacted prior or subsequently to the making of the treaty, the treaty will control, thus,

In **Hopkirk v. Bell**, 3 Cranch. (U. S.) 454, the court held that:

> "The treaty of peace between Great Britian and the United States prevents the operation of the act of limitation of Virginia upon British debts contracted before the treaty."

The opinion shows that by the fourth article of the definite treaty of peace, between the United States and his Britannic majesty, made on the third of September, 1782, "it is agreed that creditors on either side, shall meet with **no lawful impediment** to the recovery of the full value, in sterling money, of all bona fide debts heretofore contracted."

Note: The case at bar is of much more import than the above case, because here the treaty was made before Texas had jurisdiction over the territory. In fact Texas accepted the sovereignty subject to said stipulation, but that is not all,

In **Baun v. Sauerwein**, 10 Wall. 218, 222, Strong, J., said:

"It is undoubtedly a general principle, that when a statute of limitation has begun to run, a disability to sue subsequently intervening does not stop its running, even though the disability be one of those expressly recognized in the statute itself. **Notwithstanding this, however, the courts in this country have engrafted upon such statutes at least one implied exception.** Thus in Hopkirk v. Bell (3 Cranch. 454), this court **held** that the treaty of peace of 1783 by which the independence of the United States was acknowledged by Great Britain, **prevented the operation of a Virginia statute of limitation upon debts due to British subjects** and contracted before the treaty was made."

In **Pollard's Heirs v. Kibbs,** 14 Peters, at 412, it is said:

"In Hopkirk v. Bell, the treaty was held to repeal the Virginia statute of limitations. 3 Cranch. 454."

In **United States v. Thompson,** (D. C.E.D. Ark). 258 Fed. Rep. 434, the Judge remarked:

"In Hopkirk v. Bell, 7 U. S. (3 Cranch.) 454, 2 L. ed. 497 and 8 U. S. (4 Cranch.) 164, 2 L. ed. 583, which involved a state statute of limitations, a subject clearly within the exclusive jurisdiction of the states, in actions between individuals, it was held that the state statute must give way to the treaty."

In **Ware v. Hylton,** 3 Dall. (U. S.) 236, Chase, J., said: "A treaty cannot be the supreme law of the land, that is, of all the United States, if any act of a state legislature can stand in its way. If the constitution of a state (which is the fundamental law of the state, and paramount to its legislature), must give way to a treaty, and fall before it, can it be questioned whether the less

power, an act of the state legislature, must not be prostrate? It is the declared will of the people of the United States, that every treaty made by the authority of the United States, shall be superior to the constitution and laws of any individual state; and their will alone is to decide. If a law of a state, contrary to a treaty, is not void, but voidable only by repeal or nullification by a state legislature, this certain consequence follows, that the will of a small part of the United States may control or defeat the will of the whole. The people of America have been pleased to declare, that all treaties made before the establishment of the national constitution or laws of any of the states, contrary to a treaty, shall be disregarded."

In **Goefry v. Riggs**, 133 U. S. at 271, the court in laying down rules of construction of treaties, observed that: "As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. Hauenstein v. Lynham, 100 U. S. 483, 487."

In **People v. Gerke**, 5 Cal. 386, Bryan, J., said: "The treaty making power of the federal government must, from necessity, be sufficiently ample, so as to cover all the unusual subjects of treaties between different powers. If we were to deny to the treaty-making power of our government this exercise of jurisdiction over the property of deceased aliens, upon the grounds of the

interference with the course of descents or the laws of distribution of a state where property may exist, by parity of reasoning we should not make commercial treaties with foreign nations, because, it might be said, some of their provisions would injure the business of a portion of the citizens of one of the states of the Union. If the treaty-making power which resides in the federal government is not sufficient to permit it to arrange with a foreign nation the distribution of an alien's property, then that power resides nowhere, since it is denied to the states, and we must confess our system of government so weak and faulty, as to be incapable of extending to its citizens in foreign lands, that protection which is most common amongst a majority of modern civilized nations." see also Goefry v. Riggs, 133 U. S. 258.

In **Huauenstein v. Lynham,** 100 U. S. 483, which was an action by citizens and residents of Switzerland, heirs of an alien who died in Virginia, leaving property which had been adjudged to have escheated to the state, to recover the proceeds of said property, the courts of Virginia held that, by the laws of Virginia, the proceeds of the property sought to be recovered, belonged to the state; but the judgment was reversed by the Supreme Court of the United States, **on the ground that the laws of Virginia were in conflict with a treaty of the United States with the Swiss Confederation.**

In the recent case of the **State of Texas v. Balli,** (190 S. W. (2d) 71), the Supreme Court of Texas, in a well considered opinion, held that Section VIII of article 14, of Texas' Constitution, which reads as follows:

"Sec. VIII. Persons residing betwene the Nueces River and the Rio Grande, and owning grants for lands which emanated from the Government of Spain, or that of Mexico which grants have been recognized and validated by the State by Acts of the Legislature, approved February 10, 1852, August 15, 1870 and other acts, and who have been prevented from complying with the requirements of said acts by the unsettled condition of the country, shall be allowed until the first day of January, 1880, to complete their surveys, and the plats thereof, and to return their field notes to the General Land Office; and all claimants failing to do so shall be forever barred; provided, nothing in this Section shall be so construed as to validate any titles not already valid, or to interfere with the rights of third persons,"

was invalid as being in conflict with the treaty of Guadalupe Hidalgo, and the United States Supreme Court denied, (May 27, 1946) the State's petition for a writ of certiorari and denied motion for rehearing.

Can there be any distinction in principle between the issue in the case last above and the case at bar?

Another example is Texas Constitution, Art. 13, Sec. 4, which reads:

"Sec. 4. **Titles not to be Recorded or Archived; Actual Possession; 'Duly Recorded' Defined.**— No claim or title or right of land which issued prior to the 13th day of November, 1835, which has not been duly recorded in the county where the land was situated at the time of such record, or which has not been duly archived in the General Land Office, shall ever hereafter be deposited in the General Land Office, or re-

corded in this State, or delineated on the maps, or used as evidence in any of the courts of this State, and the same are stale claims; but this shall not affect such rights or presumptions as arise from actual possession. By the words 'duly recorded' as used in sections 2 and 4 of this article it is meant that such claim of title or right to land shall have been recorded in the proper office, and that mere errors in the certificate of registration, or informality, not affecting the fairness and good faith of the holder thereof, with which the record was made, shall not be held to vitiate such record."

In **Gonzalez v. Ross,** 120 U. S. 605, the Supreme Court of the United States held that said section 4 was invalid as being in conflict with the treaty of Guadalupe Hidalgo, and remarked:

"A man whose title was good in 1876 when the constitution was adopted, whether his muniments of title were on record or not, could not be deprived of it by a simple ipsi dixit of the constitution, any more than by a legislative act."

And in **Lerma v. Stephenson,** 40 Fed. 356, Judge Maxey held the same section above quoted to be invalid, saying:

"The grant being admitted to be a valid grant, is within the protection of the treaty of Guadalupe Hidalgo and the Constitution of the United States, and it is not competent for the State to nullify it as a stale claim, without judicial inquiry, or to prohibit its use in evidence. Treaty of Guadalupe Hidalgo and the second clause of the protocol."

Then again, the Texas' Supreme Court in **Texas-Mexican Ry. Co. v. Locke,** 12 S. W. 81 held the same

section invalid as being in conflict with the treaty of Guadalupe Hidalgo and the Constitution of the United States.

In United States v. 43 Gallons of Whiskey (United States v. Lariviere) (1856) 93 U. S. 198 it is said:

"It cannot be doubted that the treaty making power is ample to cover all the usual subjects of diplomacy with different powers. One of these subjects relates to the acquisition and distribution of property belonging to citizens or subjects of each in the territory of the other. A treaty embracing this matter may contravene the statutes of a state, but if it does the courts will disregard them, and give to the alien the full protection accorded to him by the treaty."

A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat, by the laws of the state. See Orr v. Hodgson, 4 Wheat. (U.S.) 453; Huauenstein v. Lynham, 100 U. S. 483; In re Parrott, I Fed. Rep. 500; Kull v. Kull, 37 Hun. (N.Y.) 476. In this last case, by a treaty, non-resident aliens were allowed privileges in respect to property, which were denied them under a law of the State of New York. The treaty was held controlling.

It is not the province of courts of law to expound treaties with respect to the rights and obligations of the sovereign states parties thereto, but so far as they concern the rights of individuals, it is frequently necessary for the courts to ascertain by construction, the meaning intended to be conveyed by the terms used, and when this duty arises, the courts adopt those general rules applied in the construction of statutes, contracts and written instruments generally, in order to effect the purpose and intention of the makers. Wilson v. Wall 6

Wall, (U. S.) 83; **U. S. v. Raucher,** 119 U. S. 407, **Maryatt v. Wilson,** I B. & P. 436.

In **Ware v. Hylton,** 3 Dall. (U. S.) 237, Chase, J., said: "It is the declared duty of the state judges, to determine **any constitution or laws of any state,** contrary to that treaty, or any other, made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct."

It is obvious that the judges below ignored the injunction that,—"**Judex bonus nihil ex arbitrio suo faciat, nee proposito domesticae voluntatis, sed juxta leges et jura pronunciet.**"

We are confident that this Honorable Court recognizes the difference between "The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination," and "an arbitrary edict clothed in the form of a judicial sentence," handed down in such a case. The former is according to law; the latter is contrary to law.

The trial court's findings need but its statement for its refutation. Nay, may it please the Court, such findings awakens something more than a mental dissent. They shock the commonest intelligence and arouse a bitter resentment.

When a federal judge speaks, one feels impelled to take for granted the exrcise of an intellect schooled in logic and embellished by the greatest possible accumulation of facts baring on both sides of the question under consideration, but in the instant case, the trial judge limited his brief discussion of the historical facts

involved, to those presented to him by the defendants, and ignored those he was bound to know and were submitted by plaintiffs' counsel, as well as decisions of the Supreme Court of the United States (one as late as May 27, 1946), and those of the Supreme Court of the State of Texas, and acts of Texas Legislature, all of which, unequivocally, refute his conclusions.

Yet, the Circuit Court of Appeals, notwithstanding the fact, that it was fully advised in the premises (R. 189), sanctioned such erroneous holdings by affirming the judgment below.

Respectfully submitted,

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